BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARY E. BLEVINS Claimant	)	
VS.	)	
U.S.D. NO. 475 Respondent	)	Docket No. 1,012,023
AND	)	
KANSAS ASSOCIATION OF SCHOOL BOARDS WC FUND, INC. Insurance Carrier	)	

ORDER

Claimant requested review of the December 30, 2005, Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on April 26, 2006.

APPEARANCES

Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Anton C. Andersen, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The record also contains the November 17, 2005, testimony of Ronald P. Walker.

ISSUES

The Administrative Law Judge (ALJ) found that claimant's resignation from respondent's employ was not attributable to any bad faith on her part and the wage she received from respondent would not be imputed to her. The ALJ, however, found that claimant did not exhibit good faith in looking for post-injury employment and a wage should be imputed to her. The ALJ also found there was no deception on the part of claimant in

her acceptance of short-term disability benefits and, therefore, estoppel would not prevent her from claiming workers compensation benefits. The ALJ found that claimant gave timely notice of her injury to her immediate supervisor and to Ephram Winder. However, the ALJ found that claimant did not establish that she suffered any work-related accident. Accordingly, the ALJ denied claimant benefits.

Claimant contends the ALJ erred in denying her workers compensation benefits because the evidence showed that it is more probably true than not that her heavy and repetitive work activities caused her to suffer bilateral Achilles tendinitis with partial thickness tears or else aggravated, accelerated or intensified a preexisting Achilles tendinitis condition. Claimant agrees that a post-injury wage should be imputed to her and asserts that she has a 24 percent wage loss based on Monty Longacre's report. She contends she has a 78 percent task loss based on Dr. Geis' testimony. She therefore contends she is entitled to a work disability of 51 percent.

Respondent and its insurance carrier (respondent) request that the Board affirm the ALJ's findings that claimant's impairment did not arise out of and in the course of her employment, that claimant did not exhibit good faith in finding post-injury employment, and that claimant is not entitled to receive a work disability. Respondent argues that claimant should also be denied benefits due to failure to give proper notice, that claimant should be estopped from receiving workers compensation benefits due to her collection of short-term disability benefits, and that claimant is not entitled to work disability because she voluntarily resigned from her employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that claimant suffered personal injuries by a series of accidents arising out of and in the course of her employment with respondent. As a result, claimant is entitled to permanent partial disability compensation based upon a 51 percent work disability.

Claimant is 60 years old and currently lives in Minnesota. She worked full time for respondent for five years as a custodian. Her job required her to do a lot of walking and also required her to sweep, mop, dust, clean chalk boards, empty trash and run a buffing machine. It would take her about an hour to an hour and a half to buff the school floors, and she performed this activity twice a week. In 2000 to 2001, claimant began having problems with her heels, especially when pushing the buffing machine. She reported the problems she was having with her heels to her immediate supervisor, Maurice Adams, and asked whether she could do this job once a week only. Her request was denied. She also said she talked to Ephram Winder, the custodial superintendent at respondent, and told him she believed she injured herself at work. The Board agrees with the ALJ's finding that claimant gave timely notice of accident to her supervisor, Mr. Adams, and to Mr. Winder.

Claimant's husband was retired from the military, so she sought treatment from the Irwin Army Community Hospital (Army Hospital). She went to the Army Hospital on December 9, 2002, and complained of bilateral ankle pain, left being worse than right. She denied any recent trauma but said she had been walking quite a bit. Her examination showed some crepitus with rotation, flexion and extension. She next went to the Army Hospital on January 14, 2003. At that time she complained of multi-joint pain in her hands, wrists, elbows, knees and back. She had helped set up and take down 200 chairs at work in the last week which caused increased low back pain, hip pain and ankle pain. She returned to the Army Hospital on January 31, 2003, and said she had been moving furniture at work. She was complaining of Achilles pain, and an MRI was ordered to rule out ruptures. The MRI was performed on February 12, 2003, and revealed a tear of the left Achilles tendon and a probable tear of the right Achilles tendon. Claimant's left foot and ankle were placed in a walking cast, and she was sent to physical therapy.

After she was put in a walking cast, claimant visited with Mr. Winder, who told her she could not file a workers compensation claim and told her to file for disability instead. Claimant also testified, "That's when Mr. Winder said, 'No, don't come back to work.'"[1] Her last day of work was February 18, 2003.

On April 21, 2003, claimant met with Barbara Stewart, the payroll coordinator at respondent. Ms. Stewart assisted claimant with filling out an application for short-term disability. At that time, Ms. Stewart asked claimant if she had turned in a workers compensation claim, and claimant indicated she had not.

Ronald Walker is the superintendent of schools for respondent. At the time in question, he was the assistant superintendent for personnel services for respondent. Claimant called him on July 10, 2003, and requested a letter stating she was no longer employed by respondent. She gave him the date of June 30, 2003, as her last day, and he immediately wrote her a letter confirming that her employment with respondent ended on that date. He asked her why she was leaving her employment, and she said, "just injuries."[2] Claimant did not tell Mr. Walker that she had a work-related injury.

Claimant again contacted Mr. Walker on July 14, 2003. She told him that she would be moving from the Junction City area and was concerned about her short-term disability benefits. He wrote her a letter telling her that as long as her physician considered her unable to work, she would continue to be eligible for disability benefits under the respondent's short-term disability policy.

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[1]R.H. Trans. at 35.

[2]Walker Depo. at 6.

Mr. Walker did not recall speaking to Mr. Winder about claimant's situation and had no documentation to that effect. Mr. Winder would have been the person to whom claimant would have reported a work-related injury. Mr. Walker did not know whether claimant ever complained of a work-related injury to Mr. Winder. All workers compensation claims would come across Mr. Walker's desk, and no such claim came across on claimant. Mr. Winder no longer works for respondent and he did not testify in this proceeding.

Claimant continued to be treated at the Army Hospital after she stopped working. She was also going through a divorce during this time. In June 2003, claimant suffered a stroke. Soon after that, claimant moved to Minnesota. In January 2004, she had a total left knee replacement. She is seeing doctors in Minnesota for her problems with her heels, but is only being treated with painkillers.

Dr. Dick Geis is board certified in internal medicine, preventative medicine, occupational medicine, and as an independent medical examiner. He saw claimant on May 6, 2004, at the request of her attorney. In preparation for the examination, Dr. Geis reviewed medical records from the Army Hospital. Dr. Geis did not have any medical records showing any treatment of the claimant after her move to Minnesota in 2003.

The Army Hospital records indicated that claimant was seen on August 1, 2002, because of knee pain, left greater than right. X-rays of her knees taken at that time showed that her knees were normal. In December 2002, claimant was seen for bilateral ankle pain and bilateral foot pain secondary to increased walking at work. In January 2003, claimant was again seen complaining of low back pain, hip pain, and ankle pain after helping set up and take down over 200 chairs at work. An MRI of each of her ankles was performed in February 2003, which revealed a tear of the left Achilles tendon and a probable tear of the right Achilles tendon. Her left foot and ankle were placed in a walking cast, and she had physical therapy. In April 2003, claimant returned to the Army Hospital with increased left knee pain after a fall while wearing her left foot/ankle cast. She was seen again in June 2003 with pain and swelling in her left knee.

Claimant reported that she had a stroke in June 2003 and after that, she moved to Minnesota. She also told Dr. Geis that she had left knee replacement surgery in January 2004. She attributed the problems with her left knee to being required to wear a walking cast on her extremities. Claimant reported falling while wearing the cast and walking with an altered gait. Dr. Geis said that falling while wearing a cast or an altered gait from wearing a cast would aggravate a preexisting condition of the knee.

Claimant told Dr. Geis that she did not have any problems with her ankles or lower extremities before she started working at respondent. Claimant said that she did a lot of walking on her job. Claimant related her problems with her lower extremities to the positions she assumed doing her work and to the fact that her heels would get struck by rolling tables at work.

Claimant said that both of her heels hurt all of the time, especially when weight bearing and driving. She also complained of back pain. She reported that her right knee did not bother her at all and that her left knee was much better since her knee replacement surgery.

Upon examination, Dr. Geis found range of motion deficits in both claimant's left and right feet and ankles that was consistent with bilateral Achilles tendon tears. Dr. Geis also found significant tenderness about the calcaneus and Achilles attachment to the calcaneus. Based upon claimant's history and medical records and his examination, Dr. Geis diagnosed claimant with bilateral Achilles tendon tears/tendinitis with persistent pain and range of motion deficits, as well as status post left knee replacement. Dr. Geis opined that claimant's bilateral Achilles tendon problems were causally related to her work activities at respondent. He also believed claimant's knee problems were related to her employment with respondent.

Based on the AMA *Guides*,[3] Dr. Geis rated claimant as having a 23 percent whole person impairment. He opined that she had a 5 percent whole person impairment of each foot based on range of motion deficits with regard to bilateral Achilles tendon problems and a 15 percent whole person impairment related to the knee replacement surgery. He combined these ratings for the 23 percent whole person impairment.

Dr. Geis placed restrictions on claimant of no prolonged walking or standing, avoid stair or ladder climbing. He said prolonged walking would be walking more than 100 steps per hour and prolonged standing is greater than 20 minutes. Those restrictions are based on her foot problems. Regarding claimant's left knee, Dr. Geis recommended that she avoid kneeling, squatting or walking on uneven ground. After Dr. Geis reviewed a task list prepared by Monty Longacre, he opined that claimant was no longer able to perform 18 of the 23 tasks for a 78 percent task loss.

Dr. Geis said claimant would need future prescription medication and possibly a repeat of the left knee replacement. Other than medication, there is nothing that can be done to correct claimant's bilateral Achilles tendon problem.

When asked on cross-examination if the Army Hospital records mentioned a traumatic injury to claimant's ankles, Dr. Geis replied that constant walking could constitute trauma. Dr. Geis did not remember whether the Army Hospital medical records indicated that claimant complained of her heels being caught under rolling tables. He also stated that he was not familiar with any medical records that suggested claimant had systemic arthritis and did not see any evidence of rheumatoid or systemic arthritis when he examined claimant. He admitted that people with systemic arthritis or rheumatoid arthritis

[3]American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

have an increased chance of tendon rupture. He stated that claimant has been on Prednisone and acknowledged that people on steroids are at an increased risk for tendon rupture.

Dr. Geis did not know whether claimant had an acute tear or a chronic tear of her Achilles tendons, although he said nothing in the records indicates claimant had an acute tear. Chronic tears occur with repetitive small tears and develop over a period of time. Increased activity over time being on ones feet could cause minor micro ruptures in the tendons. He opined that claimant's feet problems were work-related by comparing her work activity with her non-work activity. He admitted that if claimant were on her feet all day cleaning her house and moving furniture, that would be similar to her job activities as a janitor and could have caused an aggravation. Dr. Geis acknowledged that he did not know what activities claimant engaged in between the time she left her employment at respondent in February 2003 and he saw her in May 2004.

Dr. Geis believes claimant has arthritis in her left knee. He does not know if this was why her knee was replaced because he does not have those records. Claimant had a stroke in 2003 after she quit working at respondent. Dr. Geis did not know if claimant suffered from a drop foot as a result of the stroke. Foot drop would shorten the Achilles tendon, which would cause less discomfort in the foot. Foot drop could alter gait, which would increase symptoms in the knees. However, Dr. Geis did not note that claimant had foot drop when he examined her.

Dr. Chris Fevurly is a board certified independent medical examiner. He is also board certified in internal medicine and in occupational medicine. He performed a physical examination of claimant on October 13, 2005, at the request of respondent. Before the examination, he reviewed the Army Hospital medical records plus medical records from claimant's medical providers in South Dakota and Minnesota.

At that time, claimant's current complaints were bilateral foot and heel pain and bilateral knee pain. She did not give him a history of her heels being caught repeatedly under rolling tables. Her last day of work was in February 2003, and four months later, in June 2003, she suffered a right hemispheric stroke resulting in left-sided weakness in her arm and leg. The stroke caused some problems with her left knee and left foot in that she developed a foot drop on the left side and had to use assistive devices to get around. Claimant also developed hammer toes in the left foot which were thought to be related to flexion contractures from her stroke. Those contractures could have caused her to have an altered gait, which would cause pain in the foot.

Dr. Fevurly's report indicates claimant suffers from calcific tendinitis. Dr. Fevurly said when inflammation occurs over a prolonged period of time, one of the results is the deposit of calcium into the areas of inflamation. This takes years to develop. He said since claimant presented with calcium in the tendons, she had chronic ongoing tendinitis of the Achilles. The tendinitis could be caused by the structural make-up of her feet and

tendons. Also, foot and leg complaints are more common in women than men because of the shoe industry. Also, claimant's weight probably was a contributing factor in the development of her calcific tendinitis. With her weight, any walking activity or any activity of daily living could be an aggravation of her calcific tendinitis. The calcification is laid down in order to help with the micro traumas; the body does this in order to keep the separation or defect from occurring. If calcification is found in the tendons, it is reasonable to assume that it would have taken two to five years to develop.

After claimant left her employment with respondent, her knees progressively became more painful to the point where she had left knee total replacement, and her right knee required a Synvisc injection. In discussing claimant's knee problem, Dr. Fevurly opined that the degenerative changes in claimant's knee occurred over a period of time. Dr. Fevurly also stated that claimant's "risk factors from the knee problems really have little to do with pushing or standing on a school floor."[4]

In examining claimant, Dr. Fevurly found very little tenderness over the Achilles and had a good range of motion and strength in the ankles. Based upon his examination of claimant's ankles, he opined that she was where she was in 2000 to 2001 and that she had no permanent impairment from the Achilles tendinitis. Claimant has a weakness in her left side caused by her stroke. He did not believe that claimant had any permanent impairment to her knee attributable to a work-related injury.

Dr. Fevurly diagnosed claimant with bilateral calcific Achilles tendinitis with partial thickness tears which has quieted down and bilateral advanced degenerative arthritis in both knees with a left knee replacement. He did not think her work activities at respondent led to the development of a permanent impairment in her ankles but said that all of her activities, be they at work or home, contributed to the aggravation of the Achilles tendinitis. He said there are no studies that have shown that people who work on hard surfaces or do long standing are at any higher risk for development of Achilles tendinitis than other people. Dr. Fevurly further stated:

> . . . I don't think that her work activity placed her at any higher risk for aggravation, acceleration or causing degenerative changes in either her Achilles tendons or her knees. I think she had significant preexisting conditions and that just the natural consequence of living is what led to the progression of her symptoms.[5]

Dr. Fevurly did not think claimant had any work-related restrictions. She does have some restrictions based on her underlying medical condition. Because of her degenerative arthritis in both knees, she should be restricted from climbing ladders and kneeling or

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[4]Fevurly Depo. at 48.

[5]*Id.* at 30.

squatting. Because of her weakness in the left lower extremity as a result of the stroke, she should not work at heights.

When Dr. Fevurly talked to claimant, she told him that her bilateral foot and heel pain was much better than it had been two years before. She was able to tolerate walking one block or going through a small grocery store, but could not walk through a big Wal-Mart. If she tried, she would have problems with foot pain, knee pain and shortness of breath.

Based on the AMA *Guides*, Dr. Fevurly found no ratable impairment in the ankles as a result of loss of range of motion. He said there is residual Achilles tendinopathy as a result of chronic calcific tendinopathy. However, Dr. Fevurly believes any aggravation of her preexisting Achilles tendinopathy from the work activity at the school district has resolved without residual impairment. According to Dr. Fevurly, the need for left knee total replacement was not causally related to the work activity. Accordingly, although there is impairment from the total knee replacement, Dr Fevurly opined that the permanent impairment is not causally related to her work activity from 2001 to 2003.

Dr. Fevurly agrees with Dr. Geis that certain of the activities claimant performed at work would contribute to and aggravate her bilateral Achilles tendon problem. The difference between the two doctors on causation can be described as Dr. Fevurly also attributes claimant's activities away from work as equally contributory and aggravating to the condition. However, it is clear from claimant's testimony that she performed the offending activities to a substantially greater extent at work than at home or away from work. Accordingly, common sense tells us that claimant's work was the more significant factor in the development of her injuries and the aggravation of her condition. In this instance, the Board finds the opinions of Dr. Geis to be more credible than those given by Dr. Fevurly. Accordingly, the Board will adopt the opinions of Dr. Geis regarding causation, functional impairment, restrictions, and task loss.

Monty Longacre, a vocational rehabilitation counselor, visited with claimant by telephone at the request of her attorney on May 12, 2005. He and claimant reviewed her job history, and he identified a total of 23 tasks that claimant performed in her 15-year work history before her injury.

Claimant had a high school education and only on-the-job training after that. Claimant said she had not made a post-injury job search and that she was still under a doctor's care. Mr. Longacre recommended that because of her age and other limitations, she try to search for a job first by contacting the WIA Programs and state vocational rehabilitation programs. He said that given the fact that she was going to have to find a sedentary job, claimant might be able to earn $5.50 per hour, but he did not believe she is qualified for that type of work.

Mr. Longacre used a web site to do some job searching in Minnesota but did not find any jobs claimant was qualified to perform. He did not do an assessment of available jobs in the Junction City area. He did not contact any unemployment offices or placement service providers in the area where claimant currently lives.

Karen Terrill is also a vocational rehabilitation consultant. She was asked by respondent to visit with claimant. She had two telephone interviews with claimant, one on July 27, 2005, and another on August 18, 2005. Ms. Terrill said she was unable to get the information needed to complete a job task analysis during either interview. This was not because claimant was uncooperative, but because of a lack of understanding of the process on claimant's part.

Claimant told Ms. Terrill during her first interview that Task No. 1 on Mr. Longacre's list, opening and closing the school, she would only do about four times a year and it took a very short time, which was contrary to what was indicated in Mr. Longacre's report. During the second interview, she told Ms. Terrill that opening and closing the school took 30 to 45 minutes a day and she did it 20 times a year. Ms. Terrill also could not pin claimant down on what amount of lifting she did and questioned Mr. Longacre's report that claimant lifted 50 pounds. She also said claimant told her that while vacuuming she lifted about 10 pounds but told Mr. Longacre she lifted 20 pounds while doing that task. Claimant told her it took her 10 minutes to clean up the eating area but told Mr. Longacre it took 50-60 minutes. Because the information she received from claimant was different than the information given to Mr. Longacre, Ms. Terrill questioned the accuracy of Mr. Longacre's report.

Claimant told Ms. Terrill that she could not work because of her stroke and knee surgery. She also indicated to Ms. Terrill that she was on Social Security disability. Ms. Terrill opined that claimant could do unskilled to very low-semi skilled work and could earn from minimum wage to as much as $6.50 per hour within her restrictions from Dr. Geis.

Permanent partial disability under K.S.A. 44-510e(a) is defined as the average of the claimant's work task loss and actual wage loss. But, it must first be determined that a worker has made a good faith effort to find appropriate employment before the difference in pre- and post-injury wages based on the actual wages can be used. If it is determined that a good faith effort has not been made, then an appropriate post-injury wage will be imputed based upon all the evidence, including expert testimony, concerning the capacity to earn wages.[6]

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[6] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000); *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000); *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

In his Award, the ALJ determined claimant is not precluded from receiving a work disability due to the circumstances surrounding the termination of her employment with respondent or because of her acceptance of short-term disability benefits. But the ALJ further found she failed to make a good faith job search and, therefore, a wage should be imputed to her based upon her post-accident ability to earn wages. The Board agrees and finds, based upon a post-accident ability to earn $5.50 per hour, claimant has suffered a wage loss of 24 percent. Based on the task loss opinion of Dr. Geis, the Board finds claimant has lost the ability to perform 78 percent of her former work tasks. Averaging the two results in a work disability of 51 percent.

The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated December 30, 2005, is modified to find that claimant is entitled to a 51 percent permanent partial disability.

Claimant is entitled to 211.65 weeks of permanent partial disability compensation at the rate of $192.59 per week or $40,761.67 for a 51 percent work disability, making a total award of $40,761.67.

As of May 5, 2006, there would be due and owing to the claimant 167.43 weeks of permanent partial disability compensation at the rate of $192.59 per week in the sum of $32,245.34 for a total due and owing of $32,245.34, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $8,516.33 shall be paid at the rate of $192.59 per week for 44.22 weeks or until further order of the Director.

All reasonable and related medical treatment is ordered paid. Claimant is entitled to unauthorized medical up to the maximum limit upon presentation of bills. Future medical will be considered upon proper application to the Director.

IT IS SO ORDERED.

Dated this _____ day of May, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director